IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

In Re:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	
as representatives of	No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO, et al,	
Debtors.	Pages 1 - 58
	December 14, 2017

HEARING

BEFORE THE HONORABLE JUDITH GAIL DEIN
UNITED STATES MAGISTRATE JUDGE

United States District Court
1 Courthouse Way, Courtroom 8
Boston, Massachusetts 02210

JOAN M. DALY
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 5507
Boston, MA 02210
joanmdaly62@gmail.com

A P P E A R A N C E S:

GARY ORSECK, ESQ., and KATHERYN ZECCA, ESQ., Robbins Russell, for GO Bondholders.

PETER FRIEDMAN, ESQ., and ASHLEY PAVEL, ESQ., O'Melveny & Myers, for AAFAF.

TIMOTHY W. MUNGOVAN, ESQ., GREGG M. MASHBERG, ESQ., and CARL FORBES, JR., ESQ., Proskauer Rose, for the Financial Oversight and Management Board for Puerto Rico (FOMB).

ELLEN HALSTEAD, ESQ., Cadwalader, Wickersham & Taft, for Assured Guaranty.

CHRISTOPHER DiPOMPEO, ESQ., Jones Day, for ERS Secured Creditors.

RICHARD LEVIN, ESQ., Jenner & Block, for Official Committee of Retired Employees.

SHANNON WOLF, ESQ., Bracewell LLP, for QTCB Noteholder Group.

LUC DESPINS, ESQ., Paul Hastings, for UCC.

MARTIN SOSLAND, ESQ., Butler Snow, LLP, for Financial Guaranty Insurance Company.

GREGORY A. HOROWITZ, ESQ., Kramer Levin Naftalis & Frankel, for The Mutual Fund Group.

ERIC WEISS, ESQ., Milbank, Tweed, Hadley & McCloy, for Ambac.

P R O C E E D I N G S

THE CLERK: All rise. You may be seated. United States District Court for the District of Puerto Rico is now in session on December 14 in the year 2017 in the matter of The Financial Oversight and Management Board for Puerto Rico as representatives of the Commonwealth of Puerto Rico, et al., case number 17-BK-3283-LTS.

Could counsel please identify themselves for the record.

MR. ORSECK: Good afternoon, Your Honor. Gary Orseck and my partner Kathy Zecca for the ad hoc group of General Obligation Bondholders.

MR. HOROWITZ: Good afternoon, Your Honor. Gregory Horowitz from Kramer Levin on behalf of the Mutual Fund Group.

MS. HALSTEAD: Good afternoon, Your Honor. Ellen Halstead of Cadwalader, Wickersham & Taft for Assured Guaranty.

MR. MUNGOVAN: Good afternoon, Your Honor. Timothy Mungovan for Proskauer Rose for the Oversight Board on behalf of itself and the debtors. With me are my colleagues Gregg Mashberg and Carl Forbes.

MR. MASHBERG: Good afternoon, Your Honor.

MR. FORBES: Good afternoon, Your Honor.

MS. PAVEL: Good afternoon, Your Honor. Ashley

Pavel from O'Melveny & Myers for AAFAF. My colleague Peter Friedman will be here in a moment.

MR. LEVIN: Good afternoon, Your Honor. Richard Levin, Jenner & Block, for the Official Committee of Retired Employees of the Commonwealth of Puerto Rico.

MR. DESPINS: Good afternoon, Your Honor. Luc Despins on behalf of the Official Creditors Committee.

MR. DiPOMPEO: Good afternoon, Your Honor. Christopher DiPompeo of Jones Day on behalf of the ERS Secured Creditors.

MR. SOSLAND: Good afternoon, Your Honor. Martin Sosland of Butler Snow on behalf of Financial Guaranty Insurance Company.

THE COURT: All right. Welcome also to our friends in Puerto Rico and in New York. I'm going to again ask everybody to make sure that they speak into the microphones so that we can hear everybody. Do you want to introduce yourself?

MR. FRIEDMAN: Peter Friedman from O'Melveny & Myers on behalf of AAFAF, Your Honor.

THE COURT: I would like to put on the record that the snow delay was not caused by the northern state of Massachusetts. Okay? So I am glad. I think we have everybody or some other people are wandering in who are still on a plane or at an airport or something. Okay. Who is

leading this one? Mr. Orseck?

MR. ORSECK: I will, Your Honor. Shall I speak from here?

THE COURT: Yes.

MR. ORSECK: Good afternoon, again. Gary Orseck from Robins Russell. We are here this afternoon, Judge, pursuant to your November 21 order which prompted the joint movants to file a new request for a 2004 Examination with 17 separate document requests. There have been objections and responses filed by the Board and AAFAF. We filed per your instruction a joint report and a reply on the same day.

Behind the scenes there have been a number of conversations going on that I will report to you, and the board and AAFAF can certainly give their version of it if they think I've misstated anything. But before we get to the questions about what should or shouldn't be produced, what privileges may or may not apply, and what does or doesn't exist, there are a couple of overarching issues that I want to briefly address first.

The first thing is that the respondents continue to maintain that the motion should be denied. So even as they are discussing with us protocols for producing information and agreements as to what else they will or will not produce, their overarching position is that Rule 2004 is inappropriate and unnecessary, and I want to just briefly address that.

We've explained at some length in our filings as to why presumptively Rule 2004 order is appropriate here pursuant to the fair and equitable test. For a plan of confirmation, it's our right to ensure that a plan of confirmation gives the maximum that the debtor could reasonably pay. And because of that we're entitled to examine the financial condition of the debtor. Our requests are specifically targeted to those legal tests.

The respondents assert three principle reasons why the motion nevertheless should be denied. The first is the Pending Proceeding Doctrine that was briefed before the November hearing and is resuscitated here. As we've laid out in our briefs, and I won't address it if you don't want me to.

THE COURT: Let me just ask, are all these points still being pursued? Let me confirm that. Is there still an objection to the entry of a 2004 Examination?

MR. MUNGOVAN: For the Oversight Board, Your Honor, yes.

MR. FRIEDMAN: Yes for AAFAF, Your Honor.

THE COURT: So maybe actually it makes sense for you to go first and explain the basis for your objection to the 2004 and then you can respond.

MR. ORSECK: Sure.

MR. MUNGOVAN: Good afternoon, Your Honor. Once

again for the record Timothy Mungovan from Proskauer Rose on behalf of the Oversight Board for itself and on behalf of the Title III debtors.

To start and to reiterate my prior point, the motion should be denied, Your Honor, and I want to address the three reasons why it should be denied.

First I want to address the renewed motion itself. Second I want to address the response that the joint movants filed on Monday. And then I want to address what remains unresolved because I think that that ties into whether or not the motion should be granted.

First of all, with respect to the renewed motion itself, nowhere do the movants -- nowhere do they acknowledge that some or all of the documents that they claim not to have were actually publicly available or available in the data room. They say they need documents and that they don't have them. Yet they don't address the fundamental fact that they're available publicly in some part or they're available in some part in the data room.

Effectively what their renewed motion did, Your Honor, is to reiterate what Mr. Orseck, counsel speaking for all of the joint movants, told you so forcefully at the omnibus hearing on November 15. And that is, they don't have these documents. But as we showed in our response last week, that's in large part not the case.

Many of the documents, the vast majority of them, in fact, are available, whether publicly or in the data room. And what they don't already have we've agreed largely to either give them, and we've given them some additional documents already, or we're prepared to largely give them some additional documents going forward. So the area of dispute around what hasn't been given and what we think properly should not be given is very narrow.

In their reply, the movants' position shifts. Their concern is no longer that they don't have the documents. That's hard for them to argue any longer. What they're really arguing is that they can't use the documents in the way that they claim they need to use them. And that's really the point that Mr. Orseck just raised.

And he referred to a plan of confirmation. Their papers refer to a plan of adjustment. And I think we're all in agreement, Your Honor, that the purpose of Rule 2004, they even say in their moving papers and we agree, the purpose of Rule 2004, "is to show the condition of the estate and to enable the Court to discover its extent and whereabouts and to come into possession of it and the rights of the creditor may be preserved -- so that the rights of the creditor may be preserved."

They have that information, Your Honor. What they're looking now and what they claim now they need the

ability to use the information in connection with the plan of confirmation or a plan of adjustment, as they've referred to it and we have, there's only one problem with that, Your Honor, that's grossly premature. There is no plan of adjustment. There will be we expect in the future a plan of adjustment. And we expect in the future when that plan of adjustment is developed and filed that there will be discovery related to that plan of adjustment, and there will be a trial in all likelihood related to that plan of adjustment.

And so their request for Rule 2004 discovery in aid of examining a plan of adjustment that doesn't yet exist itself demonstrates that their request and reason for it is premature.

THE COURT: So just address for me though why a 2004 order, which the Court has some control over, is a problem for you as opposed to even if I order a 2004 exam and your answer is and they have all these documents and these are where the documents are, why is it a problem not to have it in the form of a 2004 exam where the Court has some control? That's number one.

And two, this premature argument, I think we talked about at the last hearing, that if the discovery is going to be appropriate at some point, why is it inappropriate now?

MR. MUNGOVAN: So I'll take the first question

first and the second question second, if I may.

THE COURT: There you go.

MR. MUNGOVAN: With respect to the first question, why not a Rule 2004 order, an order granting Rule 2004. First of all, it's not necessary. The information concerning the financial condition of the Commonwealth is publicly available, Your Honor. Let me just explain why. This was released yesterday as one example.

On Reorg Research, which I'm sure every lawyer, every person on this side of the bench in the room gets, Reorg Research released a report known as the TSA Variance Report. And among other things that it identifies, Your Honor, are the revenues and the expenditures of the Commonwealth of Puerto Rico for a snapshot time period.

And we've agreed to give the movants these reports that haven't already been publicly made available. The government is making these available now. Whatever wasn't previously made available, we will make available and will be put into the data room, and they will have it. That's reason one why you shouldn't enter a Rule 2004 order.

Reason two, the area of dispute that we are disagreeing on with respect to what remains, as I said, is narrow. And that area of dispute or disagreement really in large part relates to what we believe are documents concerning or squarely within the Deliberative Process

Privilege in some way, shape, or form.

THE COURT: But it still begs the question, with all due respect, which is if I do it in the form of here are the 17 categories, here are the responses, I have some control, and the parties are all aware of what documents we're talking about. So we're not talking about a 2004 exam which was the broad request as initially which was sort of any kind of documents that are available, and I understood your objections to that.

But it seems to me that when we have categorized the documents that are being requested, and all the parties are focusing on those categories and identifying specifically what documents we're talking about, that that's a much more efficient way of actually making sure that everybody is on the same page with information.

MR. MUNGOVAN: Second reason Your Honor should deny it, and that is the Pending Proceeding Doctrine. And let me explain that specifically. And to take on one of the points that they address in their reply, which is they say, for example, at least one of the joint movants is not party to an adversary proceeding.

Well, that's not quite right, Your Honor. That party, the Mutual Fund group, is, in fact, a defendant in the BONY Mellon adversary proceeding in the *COFINA* case, so the BONY Mellon interpleader. And they're also an intervenor in

the *Commonwealth COFINA* adversary proceeding which is pending in the Commonwealth Title III case. So each of the parties we believe, the Oversight Board contends, each of the movant parties is party to another adversary proceeding or they're a party in interest to another adversary proceeding.

And in the *Commonwealth COFINA* dispute, there is currently ongoing discovery as between the Commonwealth agent and the COFINA agent. And a lot of the information that is being sought as part of this Rule 2004 case, including issues concerning revenues and expenditures, is just the type of information that we believe is part of the financial superweb which is one of the rationales that we, the Oversight Board and AAFAF, presented in our opposition papers, in our original opposition to this Rule 2004 motion.

So we believe under the Pending Proceeding Doctrine that the information that they're seeking here doesn't just bleed into, it directly relates to these other proceedings in which each of these movants is involved.

The last point that I would raise, Your Honor, is with respect to entering an order under Rule 2004, the purpose of the order is to allow them to investigate the affairs, the financial circumstances of the debtor, not just in a vacuum but as Mr. Orseck himself stated in connection with a plan of adjustment or a plan of confirmation. If and when that plan is developed and released, there will be

discovery around it.

These issues that they're seeking now, they'll have full and fair opportunity to seek this type of information without waiving any objection that we may have down the road, they'll have their opportunity to seek it in the context of a plan of adjustment that actually exists at the time as opposed to in a vacuum.

And we also have, Your Honor, pending proceedings and motions to dismiss in pending adversary proceedings where we contend the movants, which include, for example, the General Obligation Bondholders here, are essentially attacking the fiscal plan, the prior fiscal plan. And the information that they're seeking today may be in aid of and may directly relate to the claims in those cases.

So it's not just a matter of why wouldn't I, it's easier, it's a tool, for example, this Court to manage the exchange of information and what's the harm. We believe that there is potential harm. We believe that the approach is inconsistent with the Pending Proceeding Doctrine. And they're already receiving all of the information or largely all of the information that they're seeking.

And the narrow area of disagreement, as I'm happy to explain to Your Honor and we can walk through, there is very little area of disagreement as between the parties. Let me just highlight those for you. Requests 1 through 7, 12

and 13, there's largely no dispute. With respect to 1 and 2, there's a category of documents that they are seeking from the time period of September and October of 2016. We the Oversight Board have a half dozen or so documents that we are evaluating that relate to the so-called requests that the Oversight Board had made in September of 2016 to AAFAF. We have documents. We're evaluating them. We expect to be able to tell the movants in the coming days whether we can share those documents with them or not. We believe that we will be able to.

So request 8 is the first area where there may be an area of disagreement. Mr. Friedman is going to address that with respect to the DevTech model.

With respect to requests 10 and 11 which really relate to Andy Wolfe and the Wolfe model, we believe we've fully resolved their inquiries here. We've posted not only the Wolfe model but also the documents that Wolfe considered in developing the model and his conclusions in the model. And we provided the deposition of Mr. Wolfe, Dr. Wolfe, where he testified how it was that he arrived at the 0.8 percent number that the movants seem to be so concerned about. They have that information.

THE COURT: That's 9 and 10?

MR. MUNGOVAN: That's 9 and 10. I apologize. Yes, Your Honor. Request number 11, we received a reformulated

request yesterday from the movants, and the Oversight Board and AAFAF are in the process of working through it and evaluating it. I expect that we'll be able to get back to them in the coming days.

With respect to requests 14 and 15, we are working through what we have that may be responsive, and we will produce it. I will note for you that some information was produced yesterday by AAFAF that specifically addresses their concerns we believe. And as of this afternoon, our understanding was at least one of the movants had not yet seen that document. It was in the data room as of last night. And I expect that if they have concerns we can discuss them, but we believe that we've complied with 14 and 15. At a minimum we're working through it.

Let me skip 16 for a minute and address 17. We have a few documents with respect to 17 on the order of a half dozen that we believe that we'll be able to review and potentially produce. And we expect to be able to resolve that in the coming days.

So really what we're talking about is request 16. We believe that that's the principle area of disagreement between the parties right now. And we believe that in their reply they have recast request 16 more broadly than the request is really stated or articulated. But regardless, with respect to request 16, it looks in two directions, Your

Honor. It relates retrospectively to the fiscal plans, we'll call them the 2017 fiscal plans. We provided, as you saw in our opposition papers, a substantial amount of information concerning the fiscal plans and the fiscal plan models.

On a forward-looking basis prospectively they're looking for information concerning the future fiscal plans. We'll call those the 2018 fiscal plans. Those plans are in process. They're being developed and worked out. We've agreed that if and when we develop those new fiscal plans, we'll produce the same information that we produced with respect to the 2017 fiscal plans once those plans are finalized.

THE COURT: So I assume you're claiming a privilege on the --

MR. MUNGOVAN: With respect to the in-process development work today, which I think is really the area of disagreement for the future fiscal plans, yes. We believe that they're objectionable on three grounds. It's not a proper purpose of Rule 2004. Mr. Friedman will address that specifically.

Deliberative process privilege. We believe that it's squarely within the deliberative process privilege. And number three, we believe that it treads on Rule 106(e), Section 106(e) of PROMESA, excuse me, and therefore it's not a proper area of inquiry.

At a minimum, Your Honor, we believe that it's premature. And for them to be able to obtain that information at this moment in time is terribly premature. But what we have said, and we said this in the context of the joint status report, we're prepared to get together with them and think through and identify on a category basis what we believe may be covered by the deliberative process privilege.

Your Honor, we believe that is really the sole area of disagreement. And for you to enter a Rule 2004 order on the basis of that one area of disagreement feels like using a missile to kill a fly. It's needless and excessive. And at this point in time what we would suggest is you deny the motion without prejudice. We continue the process that we've undertaken.

We certainly believe that we've demonstrated based on everything that we've shown the Court that contrary to the story that we believe you were left with, a significant amount of information was shared a long time ago, and we continue to share information. And the quality and degree of information has improved in part because of AAFAF's processes have improved. And so they're getting the kind of information now that we believe is indisputably the type of information that they sought and are seeking, and they're getting it.

And we're prepared to work with them to evaluate

whether they're genuinely looking for information that we believe concerns the development of the future fiscal plans. And if that is what they're looking for, we're prepared to discuss it with them. And we can come back here and the Court can decide whether or not they should properly obtain it.

THE COURT: What about the limitations on the documents that have been produced? I gather that there are various levels of restrictions.

MR. MUNGOVAN: So let me describe that, and then I believe that we have a proposal -- we have a proposal. We shared it with a few of the counsel before this hearing began, Your Honor. And Mr. Friedman will describe it in more detail. But let me at least describe the state of play. There are restrictions on documents in the data room. And those restrictions arise from three sources.

Source number one is a nondisclosure agreement that the parties who have obtained access to the data room have executed in order to obtain access. That's category one.

Category two. Certain documents were loaded into the data room that are also subject to what we will call a confidentiality order and stipulation. For example, in the Peaje adversary proceeding in the HTA Title III case, the parties to that adversary proceeding, namely the plaintiff Peaje and the defendants entered into a confidentiality

stipulation and order controlling those documents.

What Judge Swain ordered as part of the HTA Title III case is that the other parties to the other two pending HTA adversary proceedings, namely the monoline insurers, we call it the Ambac case, and we at the Oversight Board refer to it as the Assured case, although there are two other plaintiffs in that case as well, they entered into a similar protective order and received access to the documents that were subject to the Peaje protective order. That's the second category of restriction on the documents.

The third category of restriction is the mediation agreement. There is a folder, if you will, and I'll describe the data room in more detail just so the Court understands it, but there is a folder within the data room that is intended to have the documents and information that were provided in the context of mediation to the parties who have entered into the NDA in the data room.

THE COURT: Those are separate?

MR. MUNGOVAN: Those are separate. They are separate, and they are protected separately by the mediation agreement.

THE COURT: For the NDA and Peaje?

MR. MUNGOVAN: Peaje. It means tolls in Spanish.

THE COURT: Are there different levels of protection?

MR. MUNGOVAN: Within the Peaje Agreement? I do not believe so, Your Honor. There are not separate levels of protection within the Peaje confidentiality stipulation and order.

THE COURT: Is it different than the NDA?

MR. MUNGOVAN: It is different than the NDA, yes, Your Honor. Just to describe the data room because I went back on it to take a look so I could describe it to you. It's like a website. It's a protected website. It lists all of the documents. I believe that it's hosted or related to Intralinks which is a well-known hosting function that allows for the sharing of information on a restricted basis.

And all of the documents are loaded there with titles and names. There's an outline that we have created that we have that shows the documents that are on there. And parties are given electronic access to that website through a password. And when documents are loaded on there, as I understand it, because I see the document notice come through, when documents are loaded on that I have a right to access, I receive an Intralinks notification to tell me new documents are loaded on.

If this is an appropriate time, I'd like to turn it over to Mr. Friedman to at least address, Your Honor, both the appropriateness of 2004 with respect to what we'll call materials concerning the development of the future fiscal

plan and also to address the proposal that we had made with respect to lifting or resolving the restrictions on use which was really the key point, I believe, of the movants' response.

THE COURT: I'm trying to figure out the most efficient way to do it. Why don't we finish, and then I'll give the movants an opportunity to address all of the above.

MR. FRIEDMAN: Your Honor, Peter Friedman from O'Melveny & Myers on behalf of AAFAF. So what Mr. Orseck said was they wanted to use Rule 2004 to understand confirmation issues and whether a fair and equitable test is met, potentially whether a feasibility test is met. Other provisions of 1129 of the bankruptcy code, which go to plan confirmation.

You ask what's the issue. The issue is the bankruptcy -- the Federal Rules of Bankruptcy Procedure actually create different kinds of discovery mechanisms precisely because they're not all to be mingled together. The plan of adjustment once it's filed and once a response is filed becomes a contested matter. And a contested matter is governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure, which then in turn don't look to Rule 2004 for discovery guidance but look to the rules in part 7000 of the Federal Rules of Bankruptcy Procedure.

They don't look to Rule 2004. Rule 2004, its

purpose is not to govern contested matters which are going to become -- matters which are going to become contested in the future. It's about understanding the financial condition of a debtor.

And so, for example, the kind of information that we're providing now, which is either I think in scope and in quality in the data room, it's really important to understand what's being put in there now in addition to the publicly available reports. It's in large part, not completely but in large part, much of the financial data that AAFAF is providing to the Oversight Board, the very entity that Congress gave it substantial responsibility for the finances of Puerto Rico to.

Its actual liquidity versus projected liquidity. It's cash flow. It's component unit reports. Right? It provides cash balances, accounts receivable, accounts payable, head count data for approximately 15 territorial entities.

THE COURT: What I'm not understanding is why -- I understand that you're telling me you're producing this voluntarily. But it also seems to me that it's the type of information that would be produced under a 2004 exam. So the fact that you are producing it voluntarily I don't think takes it out of that examination.

MR. FRIEDMAN: So, Your Honor, I think my point

is --

THE COURT: You may be going broader for whatever reason you want, to but it is the kind of information that would establish the financial condition and understanding of the financial condition of the debtor, the income, the expenses, and where the assets are and where they can be.

MR. FRIEDMAN: So, Your Honor, I guess our view on this issue is the same as Mr. Mungovan's with respect to -- the big focus of dispute is whether Rule 2004 is an appropriate vehicle for discovery about a plan of adjustment. And that's very different than financial reporting. Financial reporting we're happy to give. We don't think it's necessary to enter Rule 2004. But if a Rule 2004 order is going to be entered, it should be limited to issues about financial condition, not about the development of a fiscal plan which is clearly being sought as you heard for purposes of testing whether the confirmation standard can be met.

I think that's what's so problematic about a Rule 2004 order compelling information to be produced in conjunction with an objection to an as yet unfiled plan of adjustment.

THE COURT: If you're having a dispute about whether that should be produced or not, and you want me to resolve it, in what context do I resolve it?

MR. FRIEDMAN: Your Honor, so I think the right way

to resolve that particular issue is in two contexts. Certainly not Rule 2004. The right way to address that specific issue is either in any of the adversary proceedings to the extent that they get to a point where there are discovery disputes in the adversary proceedings if the validity or certification or other aspects of a fiscal plan are subject to litigation. That would be a ripe concrete compute where there's an actual adversary proceeding where that issue would be joined.

In fact, in some respects those issues as Mr. Mungovan already explained have already been joined. People have filed suits and they're being argued on motions to dismiss. People have filed suits and withdrawn them with statements that we'll file it again if we don't like your fiscal plan. That's one area.

The second area is when we get to confirmation of an actual plan of adjustment based on some future fiscal plan, the Court can then make a determination as to what the appropriate parameters of discovery are in connection with AAFAF and the Oversight Board's work in putting together a fiscal plan.

Those are two very concrete mechanisms for determining the issue in accordance with the Federal Rules of Bankruptcy Procedure for contested matters in adversary proceedings.

So, Your Honor, I want to switch to the use issue, and the way I've conceptualize it, and the way I explained it to the other side -- I won't speak for them. I'll let them only speak for themselves. There are four categories of information that we're producing as of now voluntarily. Depending where the Court winds up either subject to or not subject to an order.

The first is things like the Oversight Board reporting packages, Treasury single account reporting information, perhaps information in response to requests about healthcare expenditures. That's data. If it's in the data room, then subject entry of an appropriate litigation confidentiality order with respect to that kind of information, which I'm confident that all the lawyers in here can get to because we do it all the time, it can be used for the purposes of -- it can be attempted to be used for the purposes that they want to use it for. We can argue that it's inadmissible. We can argue whatever we want to. But they can at least try to use that in a different matter.

Second is information we've produced in another litigation. If we produced it in another litigation, again subject to an appropriate litigation confidentiality order, they should be allowed to try to use it for whatever purposes.

Third is stuff that we -- I want to tread really

carefully here, Your Honor. Third is stuff that's in the data room in a folder called mediation or related to mediation. I'm not going to talk about the substance of any of it. But it is information that we have put there in response to specific requests made in the mediation or perhaps even created for purposes of responding to requests in the context of mediation.

THE COURT: That's sufficient.

MR. FRIEDMAN: Okay. Our view is that should never be used in any litigation. That's off limits. In fact, we actually don't think that stuff is appropriate necessarily to be ordered to be deemed as having been produced under Rule 2004 order. But it's there. And our view is if opposing counsel sees a piece of data in that information, in that mediation information, and says to us there's data in there that we would like you to extract and produce in some format that it can be put into group one, we'll work with them and try to make that -- put that into the first bucket, try to find a way to cooperatively come up with a format that if it's data it can be used.

And the fourth category is information related to either development of past fiscal plans such as assumptions, formula, back and forth discussions between people at AAFAF or people at the Oversight Board and AAFAF or people at the Oversight Board and their consultants either historically or

on an ongoing basis. And that we have provided some of it voluntarily to this point, but we don't think it ought to be subject to either a Rule 2004 order or permitted to be used in any other proceeding unless they can come to you in the context of an actual concrete dispute in a contested matter over plan confirmation or an adversary proceeding and obtain effectively an order saying we have to be compelled to produce it over whatever objections that are actually ripe that we can assert at the time related to 106(e) or deliberative process or relevance, if it's about this fiscal plan and the next fiscal plan is radically different, it's a formulation of a plan of adjustment. All of those kinds of objections.

THE COURT: And are those documents categorized in any way in the existing room?

MR. FRIEDMAN: I think there are many that are. And for those that aren't, I will sit or people from our team will sit with anybody from the other side to help figure it out. I actually believe there is enough good faith on both sides to not, certainly with respect to mediation, put stuff out that's not supposed to be out there and to work cooperatively to avoid issues like that.

Are we going to have disputes perhaps as to what qualifies as data reporting versus things we have voluntarily given about the fiscal plan? Because just to be clear we

have said to the other side here's the model, and they have questions and we try to answer them. Our view is that's purely voluntary on our part designed to foster a useful process.

If we have to draw lines about what we think falls in that category versus what falls into the purely data-focused category or reporting category, we'll work with them about it. And hopefully we can be reasonable on both sides. If we can't, we'll have a process for coming back to the Court. That's sort of how we see the world as to both what we've provided, why we think a Rule 2004 order isn't appropriate and certainly isn't appropriate as to fiscal plan materials, and how information ought to be used across the board. Thank you, Your Honor.

MR. ORSECK: Gary Orseck for the General Obligation Bondholders again. Judge, let me go back to the point where I left off and that Mr. Mungovan picked up, which is what their reasons are for posing the entry of a 2004 order and why we think they're incorrect.

The overriding theme that they present is that it is unnecessary. It was termed to be a sledgehammer to kill a mouse, or whatever the metaphor is, a missile I think it was, and the answer is that's what's necessary. And here's why: You heard from both counsel that in recent days, just in recent days they have produced this document or that

document. And tomorrow they're going to produce the next one and the next one is coming after that, and they're willing to sit down with us and work through all of these issues.

To be clear, we welcome that. We have asked for that since June. But we have never gotten even a hint of that. We haven't gotten a production of anything, and we didn't get a production of anything after the November 15 hearing, Your Honor, when you ordered initially that our motion was premature because the threat of judicial oversight and of an order compelling them to do this was lifted.

Then the November 21 order came in, which laid out a schedule for litigating a renewed motion, and the information began to flow. And I can go through and will go through the specific document requests and the responses that Mr. Mungovan and Mr. Friedman referenced. But there is a new found, a brand-new found willingness to engage with us.

The point I want to make here is that new found willingness is not a reason to deny this motion as unnecessary. It is precisely the reason why the motion has to be granted. Because if you say that it is premature or you deny it or you say come back to me another time, while I trust counsel's good faith, the history of this proceeding and this discovery dispute is that nothing happens except under immediate threat that there will be an order compelling it to be done.

So that is the first point. Similarly, to say that the area of dispute is narrow, it has narrowed in the last couple of weeks. It has narrowed some. It hasn't gone away. But there's the old saying that being -- a sentence to be hung at dawn clarifies the mind, that is what has happened here. That is what's happened.

The second point that was raised as to why the motion ought to be denied is again this Pending Proceeding Doctrine. That is a red herring, Judge. The purpose of that doctrine as we laid out in our briefs is that a party to an adversary proceeding in which discovery is constrained by the bankruptcy version of Rule 26, the Federal Rules of Civil Procedure, should not be circumvented by running into the court in the main bankruptcy case and asking for much broader discovery under 2004. And by broader I mean mostly procedurally broader.

In 2004 discovery you don't generally have a right to have counsel at a deposition. You don't have a right to object. And what the cases say is it would be an end run, it would be unfair to allow the looser procedures that apply in a 2004 examination to apply in an adversary proceeding where Congress decided that a different regime should apply.

That has nothing in common with what we're talking about here. We're not trying to circumvent the narrow procedural constraints of discovery in any adversary

proceeding. Indeed some of the parties here are not parties to an adversary proceeding in the Title III case, and the ones who are focus on issues that are discrete and distinct from the financial condition of the debtor issues that we're pursuing here.

The last thing I want to say about this is even in some of the cases where courts have held that 2004 discovery should be denied have held that the discovery can take place but pursuant to the procedural constraints of Rule 26.

And we've already told the other side and we've agreed that the normal procedural protections of Rule 26 of the Federal Rules of Civil Procedure may apply in the 2004 examination we're seeking here.

So the idea that they can just point to one or more adversary proceedings, some of which have been dismissed, and say that that is a blanket reason to deny the 2004 discovery that we're otherwise entitled to is, as I said before, is really a red herring.

The last, I think, procedural argument that they've made as to why we're not entitled at all I think was presented by Mr. Friedman who said if the purpose for which we're seeking to discover the financial condition of the debtor is so that we can evaluate the plan of adjustment, well then, there's a different vehicle for doing that, and it comes much much later.

We've already been through this. I'm not aware of authority that says that if the purpose or one of the purposes for which the movant is seeking to discover the financial condition of the debtor is to prepare to evaluate a forthcoming plan of adjustment, well then, 2004 is inappropriate.

What they're really going for here is simply to put this off and to ask that -- I think it was said quite explicitly that the discovery we're seeking, we'll talk about that down the road, we don't have to deal with it now, we can deal with it later. And as I said one month ago at the last hearing on this, all that will do is ensure if discovery begins later that this process will take that much longer than it otherwise would have taken. That is the only thing that that delay will accomplish.

The second set of issues I was going to turn to unless you have questions, Judge, are the use points, the issue of the nondisclosure agreement and the mediation agreement and then this Peaje order which the GO's are not a party to that.

THE COURT: Before you get there, as I'm envisioning it, and it is I recognize a different situation than a lot of 2004 exams which start at the beginning and are sort of the fishing expedition which you've all quoted to me one way or the other, I view the 2004 in this case as an

opportunity to have control over the production of information. And without me having to evaluate whether or not the information comes voluntarily or not, it is a way and I have the discretion under 2004 to limit the discovery.

So if I allowed the 2004 today, it would be limited to the 17 categories of documents that have been requested subject to objections as we work out; and that any new requests for additional information would be in the form of another request -- I guess another 2004 motion for additional discovery.

Does that comport with your understanding of what we're talking about here?

MR. ORSECK: It certainly does. And there is no doubt that the Court has the very discretion you just described. And I think your November 21 order was an expression of that and an implementation of that, and the parties have proceeded accordingly. You're making my point.

In fact, the idea that the movants are trying to marshal 2004 as a way to just run roughshod and take uncontrolled discovery over things that are relevant and not relevant is just not the way it works and not the way it needs to work before Your Honor.

THE COURT: So the way I see it is that -- I don't believe that the prior pending is a bar to this 2004. I don't think there's a direct enough conflict between the

pending actions and the requests for information and the information here. I also think that 2004 is an appropriate way to get information about the financial condition of the debtor.

I am seeing it, though, as a way to specifically identify the categories of information that will be produced in the context of the 2004 without waiving any rights that AAFAF or the Oversight Board have to saying that the documents should not be produced.

And I think that works into the categories that Mr. Friedman just described. You know, the two general categories that would be usable for anything; the mediation, which I do see as a separate category with some way of, as you said, identifying information that should be removed from that category. And then there's an issue of whether or not it should be in a 2004 or whether or not you're just claiming a privilege, and consequently it shouldn't be produced, but that group of documents, that the Court would then have the opportunity to rule on whether or not they should be produced.

MR. ORSECK: Let me speak to that because we had a conversation ten minutes before you took the bench, Your Honor, and some of this was shared with us then. To just back up for a moment. The data room contains materials that are governed by or subject to an NDA or a mediation agreement

by and large. And without saying anything about what's in there, the terms of both of those instruments prohibit us from using those materials in any way in the litigation. They're drafted very carefully by lawyers. We can't use them. We can't admit them in evidence. We can't refer to them. We can't use them to cross-examine a witness at a deposition. They're there for us to see, but they are of no use for purposes of a contested hearing, an adversary proceeding or anything else.

One point that the Mr. Mungovan mentioned at the outset is that we don't mention all this wealth of material that has been put in the data room. Well, there is material in the data room, not everything we're looking for, but it is as though a party to litigation said we will produce our books and records, we'll provide the usual documentation discovery provided, however, that you can never breathe a word of it to the Court or the jury or anybody else.

So that has been our use objection and what we asked in the motion and in our reply brief is that if the respondents want to direct you to materials and say we have produced X, Y, or Z to satisfy our obligation, but it's in the data room, well, that's not fair for them to be able to say that they can satisfy their obligation without allowing us to use it.

So I think it's very clear that under 2004, if

you're going to grant the 2004 motion, as we urge you to, that the materials to be produced have to be produced in a way that we can use them. Which brings me to Mr. Friedman's four categories, but I don't want to forget to touch upon some of the 17 requests because they have a few unique issues of their own.

We are happy to hear that in category 1 that the Oversight Board reporting packages, financial information of various types will be produced; or to the extent they have already been produced in the data room, they will be deemed to have been produced subject to the 2004 order, if you enter a 2004 order. What they're proposing is we'll remove them from the ambit of the NDA or the mediation agreement, and we'll produce them to you voluntarily. I'm urging you let's not rely on voluntarily anymore. Let's meet and confer and be cordial and cooperative, but under the auspices of a 2004 order.

But as far as category 1 goes, we're in agreement with that, reserving all our rights as to whether they've produced everything we think they should produce, and they get to reserve their right as to whether there are any privileges or other types of objections that they may raise.

Same goes for the second category of materials. Those are documents produced in another proceeding, an adversary proceeding. That's specifically one of our 17

requests. And if they are agreeing to remove those as well from the ambit of the data room and whatever protections apply, that's great.

The third category is as it was described "materials created for the purpose of mediation and in this mediation folder" within the data room. And as Mr. Friedman explained it to me, what he had in mind are materials, for example, where our advisors put questions to the respondents or the respondents advisors in the context of mediation and were provided answers in written form. I think that's the quintessential example. And they want to maintain that those should remain subject to the agreement.

We don't object to that either. If it's something that was created for purposes of the mediation, then it's for purposes of the mediation. And we don't wish to admit it into evidence or cross-examine somebody on it. I suspect the only disputes there if they're not worked out are going to be something that falls into the gray area of whether it was preexisting, whether it was only attached to something created for purposes of mediation. But the one point I want to make on this is again if they are going to cite such a document as evidence to Your Honor of their compliance with a 2004 order, well then we need to be able to use it. Because if we can't use it, it's by definition useless.

THE COURT: I don't think that's what they're

saying. I think they're saying there's a separate category of documents that are created for mediation and that are only going to be used in the mediation. And if you have a dispute about whether or not that should be used broader, there will be a mechanism for resolving that.

MR. ORSECK: And we agree with that in principle. We don't object as you described it.

THE COURT: We're three for four.

MR. ORSECK: The fourth is with respect to materials that underlie the March 2017 fiscal plan, or as they put it, the 2017 fiscal plans and materials that will underlie the forthcoming fiscal plan. We disagree with them on that. There's no doubt. The presentation here was referred to a fiscal plan in the event or insofar as one is certified. Well, one is going to be certified. That's the only way this case can end. So there's no speculativeness about what we're talking about.

What we're asking for now are the materials, factual materials that underlie the already certified fiscal plan and the to-be-certified fiscal plan because those materials reflect the financial condition of the debtor. And to go to where this fits into the litigation, under PROMESA a plan of adjustment must be consistent with the fiscal plan. And, of course, the plan of adjustment must be fair and equitable.

So we have a right if we are going to be able to evaluate a plan of adjustment and decide whether we are going to contest it, whether we agree with it, we have to assess whether it is fair and equitable, which in turn raises the question whether the fiscal plan on which it is based and on -- and with which it must be as a statutory matter consistent reflects the financial condition of the debtor in a fair way.

THE COURT: It seems to me though that this is the area where we really need to deal with the privilege. That there's going to be included in various of your categories ongoing data that's going to be produced. And I think that everybody's agreed to that. Then you're going to have the deliberative process effect -- until the fiscal plan is done, I guess you're not going to know how much of this is actually deliberative process or not. But there is going to be a category of documents that are going to be communications relating to the formulation of this plan that are internal analyses.

And it seems to me that that is the category that we need to have a privilege log in some form, a description of the document, the categories of documents being withheld. And if you want to fight about it now, we can fight about it once that's all teed up.

MR. ORSECK: We agree in principle with that, too,

Judge. I thought that they were proposing a broader protection, which is to say, I'm pretty sure they've said, that any material, be it factual or deliberative that underlies the forthcoming fiscal plan shall not be produced until after that fiscal plan is certified.

We understand how the deliberative process privilege works. If they want to create a log and say that there was a sensitive conversation or a memorandum advising one party by another that ought to be withheld, they can log it. We'll evaluate it. We'll meet and confer with them, and you can resolve any disputes.

But what I think they can't do is take the categorical position that as a matter of law until the new fiscal plan comes out, when it's introduced, when it's certified, that prior to that time any underlying factual information is deliberative. That makes no sense. It's not consistent with the nature of the privilege.

THE COURT: I'm not hearing that. What I'm hearing is something that says, while our consultants are working it through and figuring out which is the underlying data that they're actually using, and that's the process that we're talking about, that's deliberative.

To the extent that we have facts about what is actually happening and what the data is actual events, that's being produced. I have some nods at me and some blank

stares.

MR. ORSECK: I just think it has to be addressed in the context of a log because we can't tell what they're putting in one category or another.

THE COURT: I do think that there are two issues, and I'm sorry. But I think you have raised two issues with respect to it. Some of it is deliberative process. And another that I'm not clear on is whether you're saying regardless of deliberative process I shouldn't be allowed to order that under a 2004.

I don't know if that's a distinction with a real difference given what the intent is for voluntary disclosure or not. I don't know if that's worth actually addressing. Or maybe we just reserve it until the documents -- one of the objections can be one, we're withholding it under deliberative process; and two, we don't think we should have to produce it under 2004.

MR. FRIEDMAN: Your Honor, may I just try to clarify? I couldn't tell if you were asking me a specific question in real time or not.

THE COURT: Yes.

MR. FRIEDMAN: So, Your Honor, Peter Friedman from O'Melveny. There are, I guess a variety of issues. First of all, with respect to data, some of the data is going to be produced in that first category already, right? Some of the

information that's being used in the fiscal plan will obviously overlap with budgetary issues, will be driven by financial information that's going to be in the very reporting information that we're already providing.

We're not going to restrict the amount of data we're providing because it also is related to the fiscal plan. What we don't think we have to produce certainly while it's being developed are -- and shouldn't have to log because I think in the history of bankruptcy, people don't get to take discovery into ongoing plans of reorganization, for example, in a typical case like telling us how you think you're developing your plan of reorganization while we're in that process of putting together models or putting together analysis or having communications, we shouldn't have a production obligation.

Let the process be finished. And then at that point if there's litigation over the fiscal plan or a plan of adjustment, they can either start with voluntary requests like we've provided them information in the past. And if they're entitled to it at that point, then we will also categorically log information that's responsive to requests that are allowed by the Court that we're seeking to withhold. But it should not be an ongoing process pre certification in addition to the other burdens that the Commonwealth is dealing with and putting together where people get like real

time or quasi real time obligations to log or get documents apart from the general financial reporting obligations which I think people will see are quite robust.

MR. ORSECK: Judge, our position is they have an obligation, I don't know whether real time is every day, but on a reasonable basis to update their production. And that is both with respect to the forthcoming fiscal plan but also as to the old fiscal plan. And they've told us today they've reinforced that there is a model that underlies the existing fiscal plan from DevTech that they have provided some of voluntarily. But we've had additional questions about it for inputs into it that are not clear from the model, and we've had our experts look at it. They have told us that they will not produce those materials. I am not at liberty to describe them because that is subject to their confidentiality restrictions.

But there's no reason that those materials should be withheld either on an argument that they're not the proper subject of a 2004 discovery or that they are deliberative. So I think they can log -- we can work out whether those logs can be done on a categorical basis as opposed to some massive log that goes through every particular document. Experienced counsel can work these things out. But kicking this out again until after a fiscal plan is certified as a practical matter is going to impede the process.

THE COURT: I'm having a very hard time visualizing what documents we're talking about that would not be covered by the deliberative process. If they're giving out the data and have not made a determination as to which model they're actually using, then why isn't that protected at the moment?

MR. ORSECK: Because that's factual material. A deliberative process protects policy discussions about what they ought to do, what policy to pursue, the purpose being that you don't want to chill open and candid conversations about that.

But if they are developing factual information, whether it's in the form of a model or a list of inputs, that should be produced.

THE COURT: But isn't it like a draft expert report? I'm really just trying to visualize what we're talking about here. They're taking data and trying to figure out what data they take and what percentages and what economic models they're going to use, and it's not done yet. So I understand that we shouldn't be withholding the data. There shouldn't be a dump on February 24 or whatever the day is that this model comes out.

MR. ORSECK: Our position is they should -- we're talking about two different things. There's the material underlying the as-yet-to-be-produced fiscal plan. If they are withholding material on deliberative process grounds on a

reasonably timely basis, they should provide a log of what that is. There may be areas, there may be documents that are quintessentially deliberative. Discussions among board members would be an obvious example where they want to put that into a privilege log. But they should log it. They shouldn't just get to say we're not producing material to you until after the fiscal plan is certified. And they've even told us that to the extent these materials they view as deliberative they won't produce them after the fiscal plan is certified either.

But the second category that I'm talking about and is the specific subject of a request is our request number 8, which I mentioned a moment ago, and that is a model the purpose of which I will not describe. But it is to generate inputs into the existing fiscal plan. It is to generate numbers that inform the fiscal plan. That has been produced voluntarily.

But there are pieces of it that we don't see that are just inputs that come from somewhere else and that are not explained. They are withholding that material, or they assert an objection to producing that material. We sent them a list of what we want, and they have declined to do that.

MR. FRIEDMAN: That's not true.

THE COURT: Isn't this the one though that you just said that you have produced additional information and

there's a deposition or something?

MR. ORSECK: No. That's different. That's Dr. Wolfe which they have produced. Excuse me.

The materials that I'm talking about they have placed in category four which is to say we would not be able to use it, which to me is the same point.

So on the use issue, Judge, to circle back, we are in agreement in principle on the first two categories. On the third category we're also in agreement in principle so long as what they are holding within the mediation folder in the data room are materials that relate only to the mediation and are in the underlying factual materials.

Where we disagree are as to materials that underlie the old fiscal plan and the new fiscal plan. We think that they are both discoverable under 2004. And to the extent they want to assert deliberative process privilege, they should just go ahead and assert it.

The last thing I want to do is touch on a couple of the specific requests that are outstanding. Most of these they've said that they will continue to look for materials. We've asked for a response in a week as to where they stand on these. They've asked to do it a bit later than that. But the one I want to raise --

We had a request that asked for all documents that identify what they have defined as essential services. Under

PROMESA there is a requirement to fund essential services. And they have at times taken the position that essential services come before payment of the debt to GO Bondholders. So we have asked them identify what the essential services are in the fiscal plan or any other discussion or identification of what are essential services.

We were told in a meet and confer, and if counsel will confirm this, we will deem request number 12 to be satisfied, but we were told that they are unaware of any such documents that identify essential services or define essential services either that were provided to the Oversight Board or that have been used or relied upon in connection with the formulation of any draft or final fiscal plan.

If they will make that representation, then we deem that request satisfied. I think the rest remain to be worked out as to what they will and won't produce as to by when and the question of use and whether deliberative process must be logged or not.

MR. FRIEDMAN: Peter Friedman from AAFAF, Your Honor. I will say with respect to the last issue, number 12, that is my understanding with respect to essential services. We will continue to look. If we identify something that falls into the category of -- so I view it as part of a continuing obligation on our part to look to see if there are documents about essential services that have been provided to

the FOMB by AAFAF or used or relied upon in connection with the formulation of a fiscal plan. I'm not aware of it. We've made inquiries. We will keep looking. And if it turns out, I understand we have an obligation to produce. I have made a representation based on my current understanding and our firm's understanding based on reasonable increase, we'll keep looking.

THE COURT: So as I understand, I have a decision as between December 22 and January 5 on when you're reporting?

MR. ORSECK: I think that's right.

THE COURT: I'll give you January 5 if you want to wreck your holidays. I don't have a problem with that.

MR. MUNGOVAN: Your Honor, can I just be heard at the podium with respect to one item?

THE COURT: Yes.

MR. MUNGOVAN: Your Honor, Timothy Mungovan for the Oversight Board. What is it specifically that we're supposed to be reporting on for January 5?

THE COURT: Are you asking me? As I understood it from the papers, that was your agreement as to when you were going to report on what you had been searching for, and they wanted you to give them a status report as of December 22. You wanted to give a status report as of January 5.

MR. MUNGOVAN: That's right, Your Honor.

THE COURT: I see that January 5 is acceptable.

MR. MUNGOVAN: Thank you, Your Honor. To the extent that the Court wants to hear further discussion specifically with respect to Mr. Orseck's and the movants' request for what we'll call contemporaneous logging of what we would consider to be core deliberative process and communications.

THE COURT: Let me sum up. Have a seat for a moment and let me figure out where we're going. As I see it, I am going to allow a 2004 exam as a way to control the discovery in this case. All right? I don't see it as a penalty, and I'm not making an evaluation as to whether things have been provided in a timely manner or not. That's not my intent. But I do think that the 2004 is an appropriate way to proceed.

The 2004 that I'm allowing is limited to these 17 categories subject to the objections that we're going to be dealing with. All right? So by allowing it I am not making a ruling on any of the objections that have been raised to date. Okay? If there are additional requests, and if there are additional methods of discovery, there have to be new 2004 motions.

So in other words, I'm not allowing depositions right now. I'm not allowing interrogatories right now. I am just dealing with these 17 categories of documents.

To the extent that people have moved to join in the motion, I haven't seen any objections. But it's limited again to this -- to what I'm allowing today. So I know, for example, the UCC requested broader involvement. I'm not allowing it broader right now. At least your motion referred to roles in depositions and the like. I'm not allowing that discovery right now, so I'm not making a ruling one way or the other on the role of any other parties. Okay?

There's a proposal floating about this usage, and I'm wondering whether we need to let you have some time to hammer it out and see what it looks like. I don't know the answer to that. And the second thing that I'd like to talk to on timing is that you had a proposal in -- the movants have had a proposal about how to resolve specific objections that might come along, and they were all linked to dates relating to OMNI hearings. And I'm wondering whether we want to go on that route.

I'm wondering if these kinds of issues need to be brought up at the Omnibus hearings or whether it's not more efficient to do it in hearings that are just related to discovery provided you can get to Massachusetts, which is apparently a big if.

MR. MUNGOVAN: Your Honor, for the Oversight Board, we think it's more efficient to do it specifically in a hearing before Your Honor in this courtroom.

MR. FRIEDMAN: That's because he lives here.

MR. ORSECK: We have no objection to that. Our only purpose was to make sure that this remains under your supervision on a periodic scheduled basis.

THE COURT: I think it would just be easier to not have it on the docket for the bigger hearings. All right. So whatever schedule we set up we'll be assuming that the discovery issues will be dealt with separately here. Either here or -- we can do it in New York, but we'll do it as separate hearings. Okay.

What do I do with the usage right now? Do I ask you to further explain what's being withheld, on what basis, or do you want to argue it further now? I think I'm hearing agreement on categories I'll call them one, two, three. It's the fourth that's the problem. To the extent that I'm having a hard time sort of conceptualizing where the argument is. And I don't know if I need to see it in writing or if I want to just keep letting you talk.

MR. ORSECK: Gary Orseck for the GO's. What I would propose is that you enter an order with respect to categories one, two and three on which there seems to be agreement. And I think we can take a short period of time since this was just raised with us today to see if we can reach an agreement to present to you on category four.

THE COURT: So what I would say then is that the

parties have agreed to a process whereby documents produced subject to the NDA and the other litigation, I think it's more than one, other litigation restrictions can be used for all purposes, reserving objections to the introduction of specific documents. I'm not making a ruling on admissibility or anything like that.

MR. MUNGOVAN: And purpose, Your Honor. Timothy Mungovan for the Oversight Board. The Oversight Board isn't waiving, for example, an argument that they may have that their intended use of the document is an impermissible attack on a fiscal plan, for example. What we're essentially agreeing is that the restriction that's in place in an NDA, for example, covering the data room or covering documents produced in another adversary proceeding, the movants can attempt to use those documents in a separate proceeding in some way, whether to challenge the plan of adjustment or otherwise. We're reserving all of our rights to challenge that future use of the document.

THE COURT: And I think everybody agrees on that. Why don't I give you ten days or two weeks to draft this. Okay? And I'll take a look.

MR. MUNGOVAN: That's fine, Your Honor.

MR. ORSECK: Yes, Your Honor.

THE COURT: I don't know. Where are we? On Christmas day?

MR. ORSECK: Ten days would bring us to before Christmas.

MR. MUNGOVAN: It would actually take us to Christmas Eve, Your Honor.

THE COURT: What do you want? Do you want to do it before?

MR. ORSECK: I'd rather do it before Christmas.

THE COURT: All right. Submit to me either a joint proposal on all four categories or identify -- are you okay?

MR. FRIEDMAN: Yes.

THE COURT: I see a lot of heads, yes or no. I'm trying to figure out what you're saying.

MR. FRIEDMAN: Sorry, Your Honor. Is this on the four categories or is this on the protective order that we're supposed to be submitting?

THE COURT: Let me do it in two stages. Before Christmas you shall submit a joint proposal as to usage. Period. If you can agree on four categories, that's fine. If you can't agree on the fourth, agree on a schedule and a way to present it to me. Okay? And we will deal with it promptly. Okay?

But I don't expect you to file your legal briefs -- if the fourth category is not resolved, just present to me what schedule you want and the manner in which you want to do it, and it will be done soon. Okay? Does that work?

MR. FRIEDMAN: That's fine for AAFAF, Your Honor.

MR. DiPOMPEO: Thank you, Your Honor. Christopher DiPompeo of Jones Day. We represent the U.S. Secured Creditors. I did want to raise one issue with respect to what I think is category two, the documents from other adversary proceedings. The Oversight Board indicated in its objection that it would produce documents it received from the U.S. Bondholders in discovery in the *ERS v. Altair* litigation which I know the Court is all too familiar with.

We would like to preserve our opportunity to object to that. We don't think those documents which pertain to -- as the Court will remember the perfection and enforceability of the U.S. Bondholders liens against the ERS property are relevant to the Commonwealth's fiscal situation. Many of them are also subject to a protective order. We actually don't think that the movants are really interested in those documents. Their motion was more focused on the need for all creditors to have access to all documents produced by the debtors which wouldn't apply to documents produced by the bondholders.

I spoke about this very briefly with Mr. Orseck. I think we'll be able to work it out. We haven't had the time to do it, but we'd ask to be given the opportunity to work that out and except the U.S. Bondholders from that category or if not preserve opportunity to move for

a protective order or some other relief to prevent disclosure of that information.

THE COURT: I think it's appropriate for you to bring it up, but I think we're only talking about the documents that are being produced by AAFAF who are the debtors. Does that work?

MR. MUNGOVAN: Yes, Your Honor. This is Timothy Mungovan over for the Oversight Board. It was never the Oversight Board's suggestion to suggest it was planning to produce documents produced by a plaintiff or a petitioner in an adversary proceeding. We're talking about producing documents that either AAFAF or the Oversight Board produced.

So, for example, we were not intending to produce the ERS bondholders' documents. We don't think that we have the authority to do that. The same goes for Peaje and the Peaje movants' documents and the Peaje adversary proceeding in the HTA Title III case. To the extent that the movants here are looking for the documents either from Mr. DiPompeo's clients, the ERS bondholders or from Peaje, they would have to take that up directly with those parties in interest.

THE COURT: Mr. Orseck, are you okay with that?

MR. ORSECK: We're okay. And our 17 requests didn't call for those documents.

MR. FRIEDMAN: Your Honor, Peter Friedman for AAFAF. One thing it may necessitate us doing is, for

example, with respect to deposition transcripts or deposition exhibits, we just have to check to see if any of the exhibits for witnesses are documents that were provided to AAFAF or the Oversight Board by, for example, Peaje. And we'll just need to remove those so that you don't have them -- counsel for GO Bondholders or other bondholders don't inappropriately have them. So I want to make clear that we're going to honor that across the board.

THE COURT: If it becomes a problem, we'll deal with it.

MR. DiPOMPEO: Thank you, Your Honor.

THE COURT: Before I keep rambling, does anybody else want to be heard? We're good. All right. So if I say yes on the 2004 subject to the limitations I have explained, do I have to write that or do you all understand it? I'll write it short. And then what date do you want for production of the proposed usage order?

MR. MUNGOVAN: Next Friday, Your Honor?

MR. ORSECK: Yes.

MR. LEVIN: Your Honor, Richard Levin for the Retiree Committee. Just to clarify one point. You noted there were no objections to any of the joinders. But in describing the order that you were seeking, you didn't mention that. So I just wanted to make sure that was included in the order.

THE COURT: It will be to the joinders are allowed as I stated, though, limited to whatever discovery I've allowed now. I didn't hear any objections that sharing with the movants here should be limited to the movants. So I'm going to assume it's going to everybody who joined in. Okay. The proposed usage order only needs to be okayed by the movants and the respondents. Okay? Are there other issues that I missed?

MR. ORSECK: I don't think so.

THE COURT: No? Wow. Okay. Then I should let you go.

MR. MUNGOVAN: Thank, Your Honor.

MR. ORSECK: Thank you.

THE CLERK: Court is in recess.

THE COURT: We also need the plan for resolving disputes. That should be included in the usage order. You know how you had raised a dispute three weeks before, two weeks before, one week before, include that in your proposal for the usage. All right. Thank you.

(Court recessed at 2:35 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Joan M. Daly — December 15, 2017

Joan M. Daly, RMR, CRR
Official Court Reporter

Date